Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 86-104

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioner,

v.

JEWS FOR JESUS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS

Of Counsel:

FOREST D. MONTGOMERY
NATIONAL ASSOCIATION
OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

QUESTION PRESENTED

Whether government officials may make and enforce a policy banning all "First Amendment activities" in the main terminal area of a public airport.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THIS CASE PRESENTS THE QUESTION OF WHETHER THE INHERENT NATURE OF THE AIRPORT TERMINAL IS "PUBLIC" OR "NONPUBLIC"	5
II. THE MAIN TERMINAL FACILITY OF A PUBLIC AIRPORT IS OF LIKE NATURE AND CHARACTERISTIC AS FORA WHICH TRADITIONALLY HAVE BEEN HELD AVAILABLE FOR FIRST AMENDMENT EXPRESSION SUBJECT ONLY TO NEUTRAL TIME, PLACE AND MANNER REGULATIONS	10
III. A PER SE BAN ON FIRST AMENDMENT ACTIVITY IN AN AIRPORT TERMINAL IS NOT RATIONALLY RELATED TO THE STATE INTEREST IN PRESERVING THE TERMINAL'S PRINCIPAL FUNCTIONS FROM DISRUPTION	14
IV. RESPONDENTS' INTENDED SPEECH IS DESERVING OF CONSTITUTIONAL PROTECTION OF THE HIGHEST ORDER	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Adderley v. Florida, 385 U.S. 39 (1966) 9, 13
Cantwell v. Connecticut, 310 U.S. 296 (1940) 16
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) 3
City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 10, 11, 12
Cornelius v. NAACP Legal Defense Fund, 105 S.Ct. 3439 (1985) 5, 6, 12
Edwards v. South Carolina, 372 U.S. 229 (1963) .. 18
Fernandes v. Limmer, 633 F.2d 619 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 5 (1982) 2
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 11
Grayned v. Rockford, 408 U.S. 104 (1972) 13
Greer v. Spock, 424 U.S. 828 (1976) 9, 12, 13
Hague v. CIO, 307 U.S. 496 (1939) 5, 9, 10
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 5
Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 15
ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979) .. 3
ISKCON v. Engelhardt, 425 F. Supp. 176 (W.D. Mo. 1977) 3
ISKCON v. Griffin, 437 F. Supp. 666 (W.D. Pa. 1977) 3
ISKCON v. Rochford, 585 F.2d 263 (7th Cir. 1978) 3
ISKCON v. Wolke, 453 F. Supp. 869 (E.D. Wis. 1978) 3
Jamison v. Texas, 318 U.S. 413 (1943) 14
Jones v. North Carolina Prisoner's Union, 433 U.S. 119 (1977) 13
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 3
Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) .. 9, 12
Lovell v. City of Griffin, 303 U.S. 444 (1938) 11

TABLE OF AUTHORITIES—Continued

	Page
Marsh v. Alabama, 326 U.S. 501 (1946)	9, 14
Martin v. City of Struthers, 319 U.S. 141 (1943)	16
Moskowitz v. Cullman, 432 F. Supp. 1263 (D.N.J. 1977)	3
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	16, 17, 18
Niemotko v. Maryland, 340 U.S. 268 (1951)	16
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	5, 6, 10, 12
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	6
Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981)	3, 15
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	13, 14
Schneider v. State, 308 U.S. 147 (1939)	14, 16
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	15, 18
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	5, 6, 14
Thomas v. Review Board, 450 U.S. 707 (1981)	17, 18
Thornhill v. Alabama, 310 U.S. 88 (1940)	15
United States v. Albertini, 53 U.S.L.W. 4844 (June 24, 1985)	18
United States v. Grace, 461 U.S. 171 (1983)	8, 9, 14
United States v. O'Brien, 391 U.S. 367 (1968)	18
United States Postal Service v. Greenburgh Civic Assn., 453 U.S. 114 (1981)	8, 9, 10, 12
U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983)	2
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	17
Widmar v. Vincent, 454 U.S. 263 (1981)	5, 6
Wisconsin v. Yoder, 406 U.S. 205 (1972)	17, 18
Witters v. Washington Department of Services for the Blind, 106 S.Ct. 748 (1986)	6
Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968)	3
Zwickler v. Koata, 389 U.S. 241 (1967)	15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:

	Page
THE FEDERALIST No. 51 (J. Madison) (G. Wills, ed. 1982)	17
M. Nimmer, *Nimmer on Freedom of Speech* (1984)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-104

BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioner,

v.

JEWS FOR JESUS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual

citizen's respect for, and allegiance to, our constitutional government.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 44,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case presents, for the first time in this Court, an issue on which there has been uncommon agreement in lower federal courts—the availability of areas of unrestricted general access in public airports for traditional forms of First Amendment expression. The question before this Court is quite narrow—whether municipal authorities may make and enforce a *per se* exclusion of all "First Amendment activity" in open areas of a public airport terminal.

This Court has held that the state may not enforce such a blanket prohibition of speech in places where the general public traditionally has enjoyed a right of access and where First Amendment expression, subject to reasonable time, place and manner restrictions, would not disrupt the principal function of such property. In the present case, the main terminal area of LAX Airport is such a characteristically "public forum," possessing the same features that have made traditional places of expression like public streets and parks "quintessential" public fora, a conclusion reinforced by the overwhelming agreement of the lower federal courts that have passed on this question.[1]

---

[1] *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Fernandes*

Amici submit this brief to emphasize four key points:

(1) This case presents no question (on the record before this Court) concerning a "limited" or "state-created" public forum. Petitioners' plain intent is to reserve all areas of the airport facility for non-speech uses, if it is lawful for them to do so. Such an intent, of course, cannot transform a *traditionally* or *characteristically* public forum into a "nonpublic" forum. (Petitioners now concede this, in what appears a substantial departure from the position taken in the petition for certiorari.) The central question in this case is which of these latter two categories—traditional public forum or "nonpublic" area —better applies to the main terminal area of a public airport.

(2) The forum in question here—the main terminal area at LAX—possesses the same characteristics as other traditional public fora. The term "traditional" public forum is not so narrow as to exclude other examples of the *types* of places and situations in which communication of ideas has traditionally been accorded broad latitude. A forum sharing the same essential characteristics as another forum that has traditionally been deemed open for First Amendment activity subject only to limited, neutral time and manner restrictions, should be treated in like manner. These characteristics, discerned from this

---

v. Limmer, 633 F.2d 619, 626 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 5 (1982) ("It is now generally well established that airport terminals owned and administered by governmental entities are public forums. . ."); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *ISKCON v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *ISKCON v. Wolke*, 453 F. Supp. 869 (E.D.Wis. 1978); *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); *ISKCON v. Engelhardt*, 425 F. Supp. 176 (W.D.Mo. 1977). *See Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminal); *Moskowitz v. Cullman*, 432 F. Supp. 1263 (D.N.J. 1977) (bus and train terminal).

Court's decisions, are basically two: The existence of a traditional, general right of access by broad segments of the general public and the compatibility of First Amendment expression (under certain rules) with the principal function of the property.

(3) The regulation fails the constitutional requirement of a rational relation between a speech restriction and the objective to be served by such a restriction. Even were the main terminal area not a "public forum," regulation that impinges so directly on protected expression must be subjected to exacting scrutiny of its breadth and rationality. Here, regardless of the legal standard employed, it must be acknowledged that a *per se* ban on all "First Amendment activity," without limitation or principled standards of application, is wantonly overbroad and bears only the most wooden relation to petitioners' stated desire to preserve the terminal facilities' intended functions of facilitating travel and aiding travellers.

(4) Finally, *amici* wish to emphasize what does not appear to be disputed—the importance of the pure speech and the need to protect such minority rights of free expression. The importance of the speech here is doubly reinforced by its religious nature. Free exercise rights, as well as those of free speech and press, are implicated by the Board's policy, as many religious groups (such as Jews for Jesus) believe it an affirmative responsibility of their faith to communicate their message to others. The uninhibited, robust and wide-open competition of religious ideals has traditionally held a value as high in our republic as like debate of political positions and ideas.

ARGUMENT

I. THIS CASE PRESENTS THE QUESTION OF WHETHER THE INHERENT NATURE OF THE AIRPORT TERMINAL IS "PUBLIC" OR "NON-PUBLIC".

The extent to which government may limit access to a public facility for constitutionally protected speech depends on whether the forum may be characterized as "public" or "nonpublic." *Cornelius v. NAACP Legal Defense Fund*, 105 S.Ct. 3439 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983). This Court's decisions have recognized three categories of public property or facilities for purposes of evaluating the extent to which government may lawfully restrict speech in such facilities.

The first category consists of areas in which members of the general public traditionally or typically enjoy an affirmative right of access for protected speech activities. Such areas have included sidewalks, streets and public parks. *Id.* at 45. *Hague v. CIO*, 307 U.S. 496, 515 (1939). The state may justify content-based restrictions on speech in such fora only for compelling purposes and only by regulations narrowly tailored to achieve such ends. *Perry*, 460 U.S. at 45. The state may also enforce neutral time, place and manner regulations. *Id.* at 45.

The second category consists of fora that the state has created for public speech or the unique expressive activity of different groups. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). In these contexts, the right of access is one of *equality*, rather than affirmative entitlement. The state may not exclude from such a "limited open forum" persons or

groups similarly-situated to others that are included, based upon the content of their speech. *Widmar, supra*; *Southeastern Promotions, supra. See also Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The third category consists of nonpublic fora—those areas in which the state manifestly has not evinced an intent or policy to open its facilities for indiscriminate use by similarly-situated persons, but has evidenced a contrary intent to reserve the "forum" for certain designated uses closely tied to the demonstrably nonpublic character of the facility or medium in question. *Cornelius*, 105 S. Ct. 3439; (Combined Federal Campaign); *Perry*, 460 U.S. 37 (internal mail system of public school).

It is important to emphasize that the second category—selective exclusion from limited open fora made available by government for speech—is not relevant in this case. There can be little doubt that the Los Angeles airport terminal is not a characteristically "public" forum, it has not been made one by government policy. The Board's policy could not be more clear (or more sweeping) in this respect. The Board does not desire to create, and does not appear to have created, a *limited* public forum.[2] It apparently means to keep out all "First Amendment activity," if it be lawful to do so.

---

[2] Neither the court of appeals nor the district court found it necessary to pass on respondents' alternative arguments concerning selective enforcement of this policy, which would be tantamount to discriminatory exclusion from a *de facto* "forum" of sorts. The Ninth Circuit noted that "[t]he district court ruled that the CTA is a traditional public forum, declared the total ban on First Amendment activities unconstitutional on its face, and declined to reach the other issues raised by Jews for Jesus." 765 F.2d at 792. Were this Court to reverse the judgment below, respondents would still be entitled to a trial on this issue. *Amici* do not believe it proper for this Court to decide this question on the record before it. *Cf. Witters v. Washington Department of Services for the Blind*, 106 S.Ct. 748, 751-752 (1986).

As petitioners now concede,[3] if a public area or facility is *by nature* a public forum, the state may not nullify

---

[3] See Pet. Br. at 7 ("if the interiors of [airport] facilities are traditional public forums . . . then non-airport related activities protected by the First Amendment must be allowed within the terminals restricted only by 'time, place and manner restrictions.'"); *id.* at 13 (same). This concession is a marked departure from the manner in which petitioners framed the issue presented in their petition for certiorari. In that submission, petitioners urged this Court to review the judgment below on the grounds that the main terminal area of LAX could not be classified for First Amendment purposes among such traditional fora as streets and parks *because* of the City's policy banning all First Amendment activity at the airport. *See* Cert. Pet. at 7 (decision below "can only be the result of a total disregard of the holdings . . . by this Court regarding the right of a government to limit the uses of its facilities to their dedicated and intended purposes and to disallow any other uses of those facilities whether those unrelated uses are protected or not."); *id.* at 9 (interiors of public airport facilities not traditional public fora but "[r]ather, they are intended, designed and dedicated to their airport-related purposes.").

Petitioners have now abandoned this position, perhaps in belated recognition that it lacks merit (as we argue in the text). Yet, this category mistake—the belief that whether a facility is a natural or traditional public forum depends on whether government has intended voluntarily to create such a forum—was both the primary argument advanced for reviewing the judgment below, and the premise on which petitioners had sought to distinguish *all* of the holdings of lower federal courts that support the position taken by the Ninth Circuit in this case. See Cert. Pet. at 6-7 (decision below followed "inappropriate, discredited, or inapplicable" lower court authority which "falls like a house of cards" given proposition that government may reserve a forum for designated uses.); *id.* at 9. Petitioners had sought to distinguish those holdings on the basis that they involved challenges to time, place and manner regulations and not a *per se* ban on all First Amendment activity. Cert. Pet. at 9 (fact that "some airport operators have opened their facilities to non-airport related activities" does not mean that airports are traditional public fora). Petitioners' premise appeared to have been that making such regulations somehow *created* the fora in those cases and that airport officials might validly have prohibited all First Amendment activity but voluntarily elected not to do so. There is absolutely no support for such a supposition in the lower court opinions, cited *supra*, n.1. Rather, the uniform premise ap-

that nature by the bare fact of attempted regulation. *United States v. Grace*, 461 U.S. 171, 180 (1983); *United States Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114, 133 (1981). A contrary position would permit state officials to regulate speech in all public areas. The state would simply characterize the facility in question as "nonpublic" or "limited to designated uses" by virtue of the deliberate decision to restrict speech in such

---

pears to have been that speech in such fora can only be regulated by narrow time, place and manner rules because of the characteristically and essentially "public" nature of such places. Petitioners have *abandoned* this argument entirely in their brief on the merits, now acknowledging that if airports are by nature or tradition public fora, First Amendment activity may not be made the subject of a flat prohibition (as it was here), but only neutral time, place and manner rules.

Significantly, petitioners' shift also abandons any pretense that the blanket restriction on speech is designed to serve a *non*-speech state goal rather than simply the nakedly *anti*-speech state goal of keeping First Amendment activity out of the airport terminal. The only interest petitioners have ever asserted in banning speech is the supposed *right* to do so *without justification or explanation*, as an incident of the right to reserve the forum for its dedicated uses, Pet. Br. at 24; *see generally* M. Nimmer, *Nimmer on Freedom of Speech*, Sec. 2.04 at 2-25 - 2-26 (1984), a justification that has no force whatsover if the terminal area is classified with other traditional public fora.

Amici believe that petitioner's earlier position was plainly wrong and is now wisely discarded. But the question this Court must now decide is whether, in light of this decided shift in position and abandonment of any argument that the decisions of other federal courts are either in conflict with or meaningfully distinguishable from the decision below or based on a subsequently discredited rationale, the writ of certiorari should now be dismissed as improvidently granted or the judgment below summarily affirmed.

Notwithstanding the lack of any conflict among lower courts and the abandonment by petitioners of the rationale on which review was originally sought, *amici* urge this Court to decide this case on the merits, with full opinion, because of the importance of the issue involved and the opportunity to clarify the rights of citizens to free expression and communication of ideas in fora traditionally made open to the public and not incompatible with such expression.

an area; the restriction in turn would be justified by the characterization.

Such a circular argument has never been accepted by this Court. If public walkways and streets in a downtown area are quintessential fora for speech, they may not be transformed into more "limited" fora or rendered "nonpublic" by an ordinance banning leafletting on those same sidewalks or street corners. *Grace*, 461 U.S. at 180; *Greenburgh*, 453 U.S. at 133. Likewise, if a public airport's main terminal area has the nature and characteristics of such traditional public fora—the question which this Court is to decide—a government policy banning all First Amendment activity in such a forum cannot perforce be deemed to change the nature of the public facility or public area in question, but is instead an unconstitutional abridgment of the freedom of speech in such an area. Simply put, government cannot by fiat make a forum which is public by nature or characteristic, "nonpublic" or "limited."

The question before the Court, therefore, is whether the public facility in question falls in the first or the third category; whether the airport's main terminal area is essentially "public" or "nonpublic" in character, more closely resembling fora such as public streets and sidewalks, or areas like military reservations, jailhouse courtyards, letterboxes and private shopping centers. *Compare Hague*, 307 U.S. 496; *Marsh v. Alabama*, 326 U.S. 501 (1946), *with Greer v. Spock*, 424 U.S. 828 (1976), *Adderley v. Florida*, 385 U.S. 39 (1966) and *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). To this question we now turn.

II. THE MAIN TERMINAL FACILITY OF A PUBLIC AIRPORT IS OF LIKE NATURE AND CHARACTERISTIC AS FORA WHICH TRADITIONALLY HAVE BEEN HELD AVAILABLE FOR FIRST AMENDMENT EXPRESSION SUBJECT ONLY TO NEUTRAL TIME, PLACE AND MANNER REGULATIONS.

This Court has noted that whether certain governmental property is public or nonpublic in character (for First Amendment purposes) involves the placement of the facility in question along a "spectrum" of situations, *Perry*, 460 U.S. at 45, ranging from "quintessential public forums" such as streets, parks, and sidewalks on the one hand, to cases involving private property or closed governmental property on the other. The first category of situations is sometimes referred to as representing "traditional public fora." But the term "traditional public forum" might misleadingly suggest that there can be *no* more fora of like kinds to add to the narrow listing given by the Court in *Hague* in 1939—streets, parks and highways. Surely this is not the case. The term "traditional" public forum is not so narrow as to exclude other examples of the *types* of places or contexts in which free and open expression of ideas has traditionally been accorded the broadest latitude, and this Court has not employed it so restrictively. Rather, what must be demonstrated is a traditional right of access *comparable* to that recognized for public streets, sidewalks and parks. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984); *see Greenburgh*, 453 U.S. at 133 (addressing question whether letterboxes may "properly be *analogized* to streets and parks.") (emphasis added).[4]

---

[4] First Amendment principles are obviously transferable from the traditional phenomena which they originally were designed to address to new examples of such phenomena developed by changes in technology. For example, electronic mass media are accorded the same constitutional protection of freedom of the press as are printed media, notwithstanding the fact that such new developments

"Traditional," as used in this Court's cases, refers to the *right of access*, not the recognition of the facility as a public forum. *Vincent*, 466 U.S. at 814. But as society changes, the "traditional" congregating places, areas of heavy pedestrian traffic and of general public access change along with it. Public airport terminals have "traditionally" accorded the right of access to broad segments of the general public, in the sense that they have been open for public egress and ingress since their inception.[5] Our mobile modern society has produced a new set of roadways in the sky; the airport corridor of today is the streetcorner of yesterday, its main terminal area little different from a sidewalk bus stop. And while few would find in airport terminals the same pleasing features as public parks, the features that traditionally have made sidewalks and parks attractive places for speakers with a particular message to meet and talk with large numbers of persons from many walks of life are undeniably present in large public airport facilities. People come and go (sometimes hurriedly but frequently less so), wander about, read newspapers and—typically—wait.[6]

---

could not specifically have been contemplated by the framers of the First Amendment. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

[5] LAX is no different from any other large airport in this respect. Access to members of the general public is broad-based and, as a practical matter, virtually unrestricted. See Pet. Br. at 5 ("The general public is not denied entrance into the terminal facility.").

[6] Airport terminals are notorious as places where persons suddenly and unexpectedly may find travel schedules changed, as anyone who has travelled through Chicago O'Hare or Denver Stapleton during the winter months can attest. It is perhaps fair to say that such times are good for little else *besides* First Amendment activity—be it reading a newspaper or magazine, engaging in conversation with another traveller, or watching television.

Just as important as the similarities of airport terminals to traditionally "public" fora are the contrasts between such areas and fora that this Court has found "nonpublic." Surely it must be acknowledged that, in terms of characteristics and customary access, airport corridors more closely resemble public streets and sidewalks than they do letterboxes for receipt of U.S. mail (*Greenburgh*), municipal utility poles (*Vincent*), the combined Federal Campaign fund drive in the federal workplace (*Cornelius*), a school's internal mail system (*Perry*), or a military post (*Greer*). The latter are not broadly and generally available to the public. Such facilities have characteristics so different from airport terminals that they understandably can be treated as public fora only to the extent that deliberate government policy has made them so. While airport corridors might be most closely analogized to the plazas of a large, modern shopping center (*compare Lloyd Corp., Ltd., supra*), the crucial feature distinguishing the two places is the fact that airport terminals are *public* property, not purely private property dedicated to commercial uses.

Significantly, it is not the initially or primarily intended use of the public property in question that makes it a quintessential forum for speech, but the characteristics of broad public access and the potential to reach a large audience at relatively small expense and without undue disruption of the property's primary use. In this respect, petitioners' argument that airport terminals differ *in character* from public streets and walkways, because designed for travel and commerce, is wholly unpersuasive. Sidewalks and streets, like airport terminals and corridors, are designed and intended to facilitate transportation and commerce, not speech. It is not, as petitioners suggest (Pet. Br. at 15, 16), that such facilities were *designed* for speech that is important, but that they are public facilities whose use for First Amendment expression by members of the public is *not incompatible*

with the use to which the premises are dedicated or primarily devoted. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Grayned v. Rockford*, 408 U.S. 104, 116 (1972); *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring).

This, we submit, is the principle that emerges from the consistent course of this Court's decisions. Where access to the forum is broadly available to members of the general public, and where the nature of the property is not inconsistent with expressive activity (see, e.g., *Jones v. North Carolina Prisoner's Union*, 433 U.S. 119 (1977)), such that the principal function of the property would be disrupted by First Amendment activity (*Greer v. Spock*, 424 U.S. 828 (1976) (military reservations); *Adderley v. Florida*, 385 U.S. 39 (1966) (jailhouse grounds)), the forum is *characteristically* (even where not "traditionally") "public," and First Amendment activity may not flatly be banned, but may only be regulated by focused and neutral rules concerning the time, place and manner of speech.

The areas of unrestricted general access in a public airport terminal possess the same essential characteristics as traditional fora such as streets and sidewalks, and should be treated in like manner. That does not mean, of course, that airport officials may not enact reasonable time, place and manner regulations specifically tailored to the unique nature of the particular forum. But that plainly is not the nature of the resolution at issue in this case. The City has not attempted a narrow regulation of First Amendment activity, designed to maintain order or decorum, to minimize disruption or noise in congested areas, to avoid harassment of travelers, or to handle a temporary, aberrational situation.[7] It has en-

---

[7] It appears that the policy may have been enacted to address the situation presented by the extraordinary security demands placed on LAX during the period surrounding the 1984 Summer

acted instead a *per se* ban on "First Amendment activity."[8] Plainly, such a flat prohibition on constitutionally protected speech fails the requirement of "[p]recision of regulation . . . in an area so closely touching our most precious freedoms." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). Like prohibitions have consistently been invalidated by this Court. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). The City's flat ban on speech in a characteristically public forum was properly struck down by both courts below.

III. A PER SE BAN ON FIRST AMENDMENT ACTIVITY IN AN AIRPORT TERMINAL IS NOT RATIONALLY RELATED TO THE STATE INTEREST IN PRESERVING THE TERMINAL'S PRINCIPAL FUNCTIONS FROM DISRUPTION.

As noted above, petitioners' regulation makes no pretense of regulating an area affecting First Amendment freedoms in a focused, precise manner. While it is obvious that such a sweeping prohibition cannot pass for a mere time, place or manner restriction, it is also the

---

Olympic Games. Whatever the merits of the regulation during such a period, the retention of such a regulation as an ongoing policy is surely unjustified either as a time, place or manner regulation or in place thereof.

[8] The suggestion that the allowance of First Amendment activity in sidewalk areas outside the terminal is somehow a mere time, place or manner regulation is specious. It is well-settled that the availability of alternative fora cannot, without more, justify a total ban on communicative activity in the public forum in which the speaker desires to have his message heard. *Grace*, 461 U.S. at 180-181; *see Schneider v. State*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); *Southeastern Promotions*, 420 U.S. at 556 (quoting *Schneider* with approval).

case that the ordinance cannot survive even the less exacting requirement of *rationality* of regulation that is required even in a "nonpublic" forum.

The ordinance bears only the most remote and wooden relation to petitioners' stated objective of preserving the airport's ability to serve the needs of the travelling public. First, its overbreadth is extraordinary. Read broadly and literally, the resolution bans far more than leafletting by non-passengers but also prohibits the vending and reading of newspapers and any non-airport related conversation between passengers. Surely the Board of Airport Commissioners intended no such result, which would certainly be considered "irrational." [9] But if it did not, then the severe overbreadth of the statute produces a second insuperable problem of irrationality, related to the requirement of Due Process—the complete lack of clear and predictable standards of application for the Resolution. *See generally Zwickler v. Koata*, 389 U.S. 241 (1967); *id.* at 250; *see, e.g., Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Thornhill v. Alabama*, 310 U.S. 88 (1940). The lack of such standards leaves virtually unfettered discretion in the hands of the enforcing authority. *Compare Shuttles-*

---

[9] While such enforcement might seem unimaginable, there are a number of hypothetical cases that lie along a continuum of real-life situations. For example, if a passenger deplaning an airplane after talking with other passengers handed each of them religious literature, could he be prosecuted for such conduct? (This appears to be quite close to the actual facts of *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981)). If a person who came to the airport to meet an arriving passenger discovered that the plane was late, could he pass out pamphlets on a public issue to others waiting in the same area with whom he had struck up a conversation? Could a traveller who became distressed upon discovering that an airport newsstand was selling adult magazines communicate that displeasure and the reasons for it to other persons in the vicinity? Would it matter if he communicated his feelings to more than a handful of persons?

worth v. Birmingham, 394 U.S. 147 (1969); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Amici do not here argue that petitioners' policy has, in fact, been selectively enforced. Such a question appears to have been reserved by the trial court as not necessary to its judgment, and is therefore not before this Court.[10] *Amici* simply maintain that either the facial overbreadth or the vagueness in application of petitioners' policy *invites* selective enforcement and cannot in any event be deemed a regulation of speech that is "rationally related" to petitioners' objectives of keeping the airport terminal area available for its primary purpose of facilitating passenger air travel. Accordingly, the resolution is unconstitutional however the "public forum" question is decided.

IV. RESPONDENTS' INTENDED SPEECH IS DESERVING OF CONSTITUTIONAL PROTECTION OF THE HIGHEST ORDER.

The parties are agreed that the pamphleteering activity of Jews for Jesus is protected speech under the First Amendment. That this point is not disputed does not mean it should be ignored, for to ignore the importance of the pure speech involved here is to ignore the significance of this case. We start with the simple observation that religious speech is certainly entitled to *no less* protection than any other type of speech. The great cases of this Court upholding the right of free speech have frequently dealt with speech of a religious nature. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Martin v. City of Struthers*, 319 U.S. 141 (1943), *Schneider v. State*, 308 U.S. 147 (1939). Indeed, the free and unrestricted communication of religious ideas has, since the days of the framing of the Constitution, enjoyed the same high and special status as speech of a political na-

[10] *See supra* note 2, at 6.

ture, reflecting both our nation's commitment to individual rights of conscience and the importance of the pluralism that results from such a commitment and, in turn, helps to preserve it. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *Murdock*, 319 U.S. at 115 (speaking of "preferred position" of speech and religion under Constitution); THE FEDERALIST No. 51, at 264 (J. Madison) (G. Wills, ed. 1982) ("In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.").

It is also important to note that the speech here involves the expression of respondents' religion as well. The *raison d'etre* of Jews for Jesus is evangelism, and of a very distinctive sort. Jews for Jesus' primary religious function is to advance a religious viewpoint within a religious and ethnic minority in this country, and to do so by persuasion and disputation in the traditional quasi-rabbinic method of discussion and reasoned argumentation from the Jewish scriptures. While this case presents no occasion for this Court to explore the outer contours of a free exercise right to preach and evangelize (respondents' rights in this regard are fully protected here by the Speech Clause), this Court has held that religious expression and related aspects of religious practice are entitled in some contexts to protections that go *beyond* those extended to comparable forms of belief as a matter of constitutional law. *See e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Murdock*, 319 U.S. at 115.[11]

---

[11] *Amici* note the natural similarity between this Court's free exercise doctrine and its free speech doctrine. State regulation that impinges on these classic liberties of conscience and expression is subjected to heightened judicial scrutiny of both the nature of the state interest being asserted (to defeat *bona fide* free exercise or speech interests, it must be "compelling") and the closeness and precision with which the regulation serves that interest and avoids

The speech involved in this case, the distribution of leaflets as a prelude and invitation to religious discussion, is, to borrow the words of the late Justice Stewart, "an exercise of . . . basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *Amici* ask that the Court give this fact due weight.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:

FOREST D. MONTGOMERY
NATIONAL ASSOCIATION
OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

December 23, 1986

---

unnecessary interference with First Amendment freedoms ("least-restrictive-means"). *Compare Thomas, supra* and *Yoder, supra with United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *and United States v. Albertini*, —— U.S. ——, 53 U.S.L.W. 4844, 4847 (No. 83-1624, June 24, 1985) (quoting *O'Brien* with approval); *Compare Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) *with Murdock*, 319 U.S. 105. Here, free exercise and free speech doctrines work together to reinforce the importance of the First Amendment activity which petitioners' policy seeks to suppress.